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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MARY GASKIN et al., Plaintiffs and Appellants, v. DEBRA WEGMAN, Defendant and Respondent.	B230252 (Los Angeles County Super. Ct. No. PC042255)

APPEAL from a judgment of the Superior Court of Los Angeles County, Randy Rhodes, Judge. Affirmed.

Timothy D. McGonigle Professional Corporation and Timothy D. McGonigle for Plaintiffs and Appellants.

Nemecek & Cole, Jonathan B. Cole, Mark Schaeffer and Lucy H. Mekhael for Defendant and Respondent.

Defendant and respondent Debra Wegman represented plaintiffs and appellants Donald and Mary Gaskin and others in an action for damages to their homes due to earth movement resulting from excavation work on a slope performed by a builder. The Gaskins and other plaintiffs agreed to a settlement calling for slope restoration at the builder's expense and $4.9 million in damages to be distributed among the plaintiffs. The Gaskins disputed their share of the settlement and brought this action against Wegman for legal malpractice and breach of fiduciary duty. The trial court granted Wegman's motion for summary judgment on the issue of causation.

The Gaskins contend summary judgment should not have been granted because (1) Wegman breached the aggregate settlement agreement rule and other fiduciary duties, and (2) they presented sufficient evidence of causation. They also argue the trial court erred in sustaining Wegman's evidentiary objections and granting her motion for a protective order. We need not reach the issues of breach of the aggregate settlement rule and breach of fiduciary duty, because the trial court correctly determined that Wegman demonstrated the Gaskins could not prove causation and damages. We also hold the trial court did not commit error in its evidentiary rulings. We therefore affirm.

Allegations of the Operative Second Amended Complaint (SAC)

The causes of action for legal malpractice and breach of fiduciary duty relied on similar allegations. On January 15, 2004, the Gaskins retained a law firm employing Wegman to act as their attorney in an action to recover for damage to their home from excavation work by a builder. In November 2004, Wegman moved to a new law firm—Wegman, Levin & Stanley. The Gaskins signed a retainer agreement with the new law firm to represent them in consolidated actions against the builder and others. Wegman represented multiple plaintiffs with separate liability and damage claims and potentially conflicting issues, but the retainer agreements did not contain a conflict waiver or comply with rule 3-310 of the Rules of Professional Conduct.

When Wegman filed the actions, she represented to the Gaskins that they were to receive $182,000 to repair their home based on an analysis of damage to the home conducted by Affiliated Professional Services. Wegman proposed settling the cases on behalf of all the plaintiffs. The amounts to be received by each plaintiff were kept confidential under the settlement agreement. Wegman placed her interest in obtaining a 40 percent fee ahead of the Gaskins' interest in obtaining full compensation for damages to their property. Wegman failed to fully disclose the conflicts she had in recommending the settlement, including her substantial fee and the downside to the Gaskins.

Wegman refused the Gaskins' requests for information relating to other plaintiffs' settlement claims, how those claims were evaluated, and how much each plaintiff would receive from the settlement, citing the confidentiality of the information. The Gaskins have no knowledge of how the settlement proceeds were allocated, but had they known the true facts, they would not have settled and would have proceeded to trial. Wegman would not have been able to settle the case without the Gaskins, as the builder conditioned settlement of the agreement of all claimants.

Wegman acted below the standard of care for attorneys in the community and breached her fiduciary duty to the Gaskins by failing to: provide a conflict disclosure before settlement; disclose her conflict of interest in recommending settlement in order to obtain her fee; advise the Gaskins of substantive information regarding other plaintiffs' damage and liability claims and intentionally keeping them in the dark regarding the details of their settlements; and advise them to obtain separate counsel to consider the settlement. Wegman refused their request to divulge the amounts the plaintiffs would receive in the settlement, leaving the Gaskins with no choice but to settle under the false threat that if the case went forward they would have to oppose voluminous motions in limine and litigate the case on their own. As part of the settlement, the Gaskins confirmed they expected to receive $182,000 for damage to their property.

On October 15, 2007, the Gaskins requested a copy of their entire file from Wegman. She acted below the standard of care and breached her fiduciary duties by refusing to produce the entire file.

In January 2008, the cases were dismissed after settlement. Wegman did not answer the Gaskins' questions and withdrew as their counsel.

Wegman commenced a campaign to force the Gaskins to accept $10,000-15,000 to settle the case. She originally offered $10,000, but when the Gaskins protested, she increased the offer to $15,000. Wegman breached her duty to fully advocate on their behalf so that she could allocate more of the settlement to other plaintiffs.

Wegman's Motion for Summary Judgment or Summary Adjudication

Wegman argued the Gaskins could not establish that her conduct was the proximate cause of damages. The Gaskins entered into the settlement agreement aware that the agreement was largely directed at slope repair, which was to their benefit. The only evidence of their claim to damages is the estimate of Affiliated Professional Services, which did not establish causation. A breach of duty, which does not result in damage, does not establish a cause of action for legal malpractice. The total amount of estimated damages are being held in trust, but the Gaskins have refused to resolve their dispute over the funds through a third party neutral arbiter, and they cannot claim additional costs of repair because the case has settled.

Wegman's separate statement of undisputed facts was supported by her 17-page declaration and voluminous attached exhibits that established the following. A damage estimate of $177,234.28 on the Gaskins' home was prepared by Bill Thomas of Affiliated Professional Services. The estimate did not determine causation, a subject that is beyond Thomas's expertise, but he did see signs of soil settlement. Dr. Daniel E. Pradel, the retained geologist, told Wegman he could not testify that the excavation directly affected the Gaskins' home. He suggested Wegman consult with a structural engineer. Wegman retained Dmitry Vergun, a structural engineer, who reached a conclusion consistent with that of Dr. Pradel. Donald Gaskin testified in deposition that Affiliated Professional Services was an expert on cost of repair, and that the experts who conducted a geotechnical investigation of the Gaskin's property concluded it was outside the zone of

influence of the excavation and there was no evidence that excavation caused any damage to the home. There were a number of other potential causes to the damage to their home. The Gaskins owned and sold two other houses on the same street as their residence but did not join the litigation as to those homes and did not disclose the litigation at the time an adjacent home was sold.

Wegman informed the Gaskins of the results of the expert evaluations. She told them they would most likely receive a token offer. Several mediations were held, but no settlement was reached. Further discovery took place.

In a third mediation, the builder took the position any settlement had to include the claims of all plaintiffs. A series of communications followed between Wegman and the Gaskins. Wegman suggested the Gaskins accept $10,000 to settle and later suggested $15,000. At various times, the Gaskins requested settlement that called for an equal distribution between all plaintiffs, immediate payment of $70,000 or $182,000 (which they believed was the amount of the estimate of damages).

The builder indicated the intent to move forward with a global settlement. The Gaskins signed the settlement. The Gaskins demanded $90,000 and refused to authorize payment of attorney fees until they were paid. Wegman refused. In a later communication, the Gaskins demanded the entire case file, including matters relating to other plaintiffs. Wegman communicated that she could not release the entire file and urged the Gaskins to seek independent counsel and to arbitrate before the retired judge who handled earlier mediations. The Gaskins responded with a demand for $180,000, refused to agree to disbursement of funds, and declined to mediate the dispute.

In November 2006, the Gaskins signed the case settlement for repair of the slope. In August 2007, they signed an agreement in principle for a lump sum of $4.9 million payment to all the plaintiffs. In October 2007, the Gaskins executed a formal settlement agreement, in exchange for release of all claims and dismissal of the action. They do not object to the settlement other than the dispute as to their share. They admitted the slope repair was to their benefit. The Gaskins acknowledged they were advised to consult with independent counsel. Before signing the agreement in principal, the Gaskins read,

understood, and agreed to the terms of the document and knew of their right to consult independent counsel. They also knew the result of the geotechnical investigation and that the experts were unwilling to testify to the causation of their damages, and that Wegman could not engage in protracted negotiations with them over their share of the settlement.

The property owners' lawsuit was dismissed in December 2007. Wegman informed the Gaskins $180,000 was preserved in trust to satisfy their demand. Wegman told the Gaskins she would recommend to the other plaintiffs that the Gaskins receive $20,000. The Gaskins responded that they would mediate the matter but only if guaranteed a minimum of $40,000.

An amount equal to the Affiliated Professional Services assessment of the cost to repair the Gaskins' home has been held in trust. The Gaskins have no evidence the full amount has not been held in trust, and they never took any steps to resolve the dispute over their share of the settlement as suggested by Wegman. They admit that no one has informed them that damage to their home was caused by the excavation, and they could not identify any expert to testify to causation at trial. They admit they knew there was no guarantee of success at trial and could be exposed to a cost award.

Mary Gaskin testified she was never told by Wegman that the full amount of the Affiliated Professional Services' estimate would be distributed to them, never spoke with Wegman about the Affiliated Professional Services' report, and could not recall Donald Gaskin telling her that Wegman assured such a recovery. The Gaskins admitted they have no evidence that Wegman was motivated by personal interests in reaching a settlement.

The Gaskins' Response to the Motion for Summary Judgment

The Gaskins argued that Wegman's conduct regarding the settlement violated her fiduciary duty and fell below the standard of care. Wegman had a conflict of interest among the plaintiffs by separately negotiating the amount of recovery for each client. She compounded the problem by refusing to provide the Gaskins with a copy of their file

and other information they were entitled to receive. The Gaskins would not have agreed to the settlement in the absence of this misconduct and would have received a better result through trial or settlement. Because the builder demanded a global settlement and allocated money for the Gaskins' loss, Wegman cannot rely on a lack of causation. Wegman did not adequately investigate causation for the Gaskins' damage, and the Gaskins have experts who will establish causation.

The Gaskins disputed Wegman's assertion that geotechnical investigation showed that their property was outside the zone of influence of the excavation, because Wegman used the Affiliated Professional Services' estimate in settlement negotiations to achieve the $4.9 million damages award. Also, Stuart Mayes, the Gaskins' expert geologist, concluded that the damage had not been adequately documented and it is more likely than not that the Gaskins' home was within the zone of influence. A plumber, Kurt Bohmer, and contractor, Juan Manuel Alvarez, expressed the opinions that damage to the home was caused by earth movement.

The Gaskins also disputed that there were unrelated causes for the damage to their home. Their expert will testify the damage was caused by earth movement, and the Gaskins' property is at the "headscarp" of the landslide and the damage was not caused by any other factor. Wegman's failure to designate the Gaskins' plumber as an expert was below the standard of care for an attorney.

The Gaskins disputed numerous facts that Wegman asserted were undisputed, including that: they read and understood the settlement agreement before signing and were aware of their right to independent counsel; they knew of their right to independent counsel; were informed of the results of the geotechnical investigation and there were no experts willing to testify to causation; that the Affiliated Professional Services' report did not constitute evidence of causation; they do not object to the settlement except as to their share; the full amount was held in trust; and they never took steps to resolve the dispute through a third party neutral.

The majority of the Gaskins' disagreement with Wegman's undisputed facts centered on their contention that Wegman acted below the standard of care and violated

her fiduciary responsibilities throughout the settlement process. Their agreement to the settlement was made without knowing consent, as Wegman failed to disclose the various details of the settlement. The Gaskins were never advised of what they would receive, the method of apportionment, and the amount of attorney fees and costs. The disclosures were not within the standard of care and were a breach of Wegman's fiduciary duty. Wegman never suggested to the Gaskins that they were not entitled to recover damages for their home. These arguments were supported by a declaration of Attorney Steven Glickman.

Ruling of the Trial Court

The trial court's analysis focused on the issue of causation. Assuming there was legal malpractice and breach of a fiduciary duty, the Gaskins were required to establish that "but for" Wegman's conduct, they would have obtained a more favorable result in the underlying action. The court ruled that the undisputed evidence showed the Gaskins could not establish causation because: (1) the Gaskins admit they agreed to the settlement, even though they disputed the amount of damages they would receive; (2) their contention that they would have received a more favorable result is speculative and the mere possibility of a more favorable result is insufficient; (3) their opposition to summary judgment impermissibly adds the new claim to the complaint that the experts retained by Wegman did not adequately perform their duties; and (4) the Gaskins repeatedly claimed they were entitled to the $180,000 figure of damages based on the Affiliated Professional Services' estimate, and that amount has been held in trust pending resolution of the dispute, but the Gaskins have made no attempt to resolve the issue.

The trial court also made evidentiary rulings unfavorable to the Gaskins, sustaining numerous objections to their declarations. The court also granted Wegman's motion to strike declarations for the Gaskins' expert witnesses—Mayes, David Adame, Glickman, Juan Alvarez, Kurt Bohmer, and Margarito Castillo—on the ground the

declarations are irrelevant to the issue of causation, they relate to improper additional damages claims, or they pertained to the irrelevant issue of breach of duty.

DISCUSSION

The Gaskins present extensive argument on the issue of Wegman's duty to them but acknowledge that "summary judgment was expressly limited to the elements of causation and damages." As a result, we need not discuss, and express no opinion on, the issue of breach of duty. (*Lazy Acres Market, Inc. v. Tseng* (2007) 152 Cal.App.4th 1431, 1436 (*Lazy Acres*) ["assuming, without deciding, that [the attorney] breached such a duty, the complaint fails to state facts sufficient to show the breach proximately caused any damages"].)

The Gaskins present four distinct grounds upon which they contend the trial court erred in granting summary judgment. We discuss each contention separately below.

Standard of Review

"Summary judgment is granted when a moving party establishes the right to the entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) In reviewing an order granting summary judgment, we must assume the role of the trial court and redetermine the merits of the motion. As such, we will strictly scrutinize the moving party's papers, but the declarations of the party opposing summary judgment will be liberally construed to determine the existence of triable issues of fact. All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment. Although we must review a summary judgment motion by the same standards as the trial court, we must independently determine as a matter of law the construction and effect of the facts presented. (*Santillan v. Roman Catholic Bishop of Fresno* (2008) 163 Cal.App.4th 4, 9.)

"A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action if that party has shown that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subds. (*o*)(2), (p)(2).) If the defendant does so, the burden shifts back to the plaintiff to show that a triable issue of fact exists as to that cause of action or defense. In doing so, the plaintiff cannot rely on the mere allegations in his pleadings, 'but, instead, shall set forth the specific facts showing that a triable issue of material fact exists . . . .' (*Id.*, subd. (p)(2).) A triable issue of material fact exists only if the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. (*Santillan v. Roman Catholic Bishop of Fresno, supra,* 163 Cal.App.4th at p. 9.)" (*Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714, 719-720.)

Causation is an element of the two causes of action in this case—legal malpractice and breach of fiduciary duty. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241 [legal malpractice]; *Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 604 [breach of fiduciary duty].)

Equitable Estoppel

The Gaskins argue Wegman used the original $177,234.28 estimate of damages by Affiliated Professional Services in three mediations to negotiate the settlement of all claims, and Wegman is now equitably estopped from arguing the Gaskins are not entitled to that portion of the settlement proceeds. They reason that the builder was willing to settle for the full amount of the damage estimate. The Gaskins further argue that another plaintiff—identified as "Wills"—received a recovery of $425,000, although the damages suffered were only $217,152.69, based upon an entry in exhibit G to Donald Gaskin's declaration. Based on this recovery, the Gaskins argue that if they had not settled, they could have recovered their full damages as estimated and enough additional funds to cover their attorney fees.

"'The doctrine of equitable estoppel is based on the theory that a party who by his declarations or conduct misleads another to his prejudice should be estopped from obtaining the benefits of his misconduct.' (*Kleinecke v. Montecito Water Dist.* (1983) 147 Cal.App.3d 240, 245.) 'The required elements for an equitable estoppel are: (1) the party to be estopped must be apprised of the facts; (2) the party to be estopped must intend his or her conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) the other party must rely upon the conduct to his or her injury.' (*Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1785; see *Wolitarsky v. Blue Cross of California* (1997) 53 Cal.App.4th 338, 345.)" (*Cotta v. City and County of San Francisco* (2007) 157 Cal.App.4th 1550, 1567.)

Equitable estoppel does not apply in this case. According to the Gaskins, it was the builder who relied upon the damage estimate in the negotiating process, and if estoppel were to apply, it would be in favor of the builder, not the Gaskins. The Gaskins were not "ignorant of the true state of facts"—they were told by Wegman that the damage estimate did not address the issue of causation, and the retained experts were unable to testify that the Gaskins' home was affected by the earth movement.

We decline to apply estoppel concepts against an attorney who zealously represents a client in settlement negotiations. There is "no authority standing for the proposition that the position taken by attorneys on behalf of their clients somehow becomes binding on the attorneys when later sued by the same clients. Indeed, given the nature of litigation and of the duty owed by an attorney to his or her client we can find no support in law or logic for such a proposition." (*Loube v. Loube* (1998) 64 Cal.App.4th 421, 428 (*Loube*).)

The Gaskins' argument regarding the amount of recovery by the Wills plaintiff is without merit. Exhibit G to the declarations only shows what Wills purportedly claimed as damages, but it does not state what Wills recovered. More importantly, exhibit G was stricken by the trial court in the ruling granting summary judgment and no argument is made on appeal that the ruling was erroneous, and understandably so, as the document

lacks foundation and is hearsay. Because the Gaskins do not challenge the trial court's ruling sustaining the objection to exhibit G, we consider the evidence to have been properly excluded and it cannot serve as a basis for review on appeal. (*Villanueva v. City Of Colton* (2008) 160 Cal.App.4th 1188, 1196; *Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 140, disapproved on another ground in *Reid v. Google* (2010) 50 Cal.4th 512, 524.)

Proof of Causation

The Gaskins next argue they would have proven they were entitled to greater damages than the amount of estimated damages if no settlement had been reached. They contend the experts retained by Wegman did not do a complete job, and their own experts were of the opinion that the Gaskin home was within the zone of influence of the landslide movement. The Gaskins cite the declaration of their expert geologist, Mayes, who opined the land movement was more likely than not to cause damage to the home. Mayes also criticized the completeness of the work of Dr. Pradel and Thomas L. Slosson. The Gaskins' plumber opined that damage to pipes was caused by earth movement. Their contractor was of the opinion there were signs of damage to the property from earth movement. In addition, the Gaskins suffered water damage in 2007 when the roof leaked as a result of loose rafters and joints. They had to move from the home during repairs. The original estimate of Affiliated Professional Services did not take into account these additional damages.

"A plaintiff alleging legal malpractice in the defense of a lawsuit must prove that, but for the negligence of the attorney, a better result could have been obtained in the underlying action. (*Orrick Herrington & Sutcliffe v. Superior Court* (2003) 107 Cal.App.4th 1052, 1057 (*Orrick*).)" (*Lazy Acres*, *supra*, 152 Cal.App.4th at p. 1436; *Viner v. Sweet, supra*, 30 Cal.4th at p. 1241.) "As such, a determination of the underlying case is required. This method of presenting a legal malpractice lawsuit is commonly called a trial within a trial. It may be complicated, but it avoids speculative

and conjectural claims. [Citations.]" (*Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 357, fn. omitted.) An attorney is entitled to rely on the evaluations of experts on issues in the lawsuit. (*Bolton v. Trope* (1999) 75 Cal.App.4th 1021, 1026.)

Mayes's criticism of the work of Dr. Pradel and Slosson does not establish the existence of a disputed material fact. The SAC contains no allegation the work of Dr. Pradel and Slosson was defective or that Wegman was negligent in retaining them and relying on their expert opinions. Summary judgment may not be defeated by injecting a new issue that was not within the scope of the operative complaint. "The complaint limits the issues to be addressed at the motion for summary judgment. The rationale is clear: It is the allegations in the complaint to which the summary judgment motion must respond. (*Todd v. Dow* (1993) 19 Cal.App.4th 253, 258.) Upon a motion for summary judgment, amendments to the pleadings are readily allowed. (*Kirby v. Albert D. Seeno Construction Co.* [(1992)] 11 Cal.App.4th [1059,] 1069, fn. 7.) If a plaintiff wishes to expand the issues presented, it is incumbent on plaintiff to seek leave to amend the complaint either prior to the hearing on the motion for summary judgment, or at the hearing itself. (*Ibid.*) To allow a party to expand its pleadings by way of opposition papers creates, as it would here, an unwieldy process." (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258, fn. omitted; *Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1253-1254 ["the materiality of a disputed fact is measured by the pleadings" and a defendant need only negate those theory alleged in the complaint, not those raised only in opposition to summary judgment].)

We agree with the trial court's ruling that the Gaskins cannot establish they would have obtained a better result had they not settled. The SAC alleges the Gaskins were damaged in the amount determined by Affiliated Professional Services, which was approximately $180,000. The Gaskins brought suit against Wegman to "[p]ay the $182,000 in actual damages ascertained by . . . Affiliated Professional services." The evidence is uncontradicted an amount sufficient to satisfy the Gaskins' claim has been

placed in trust. The only reason this dispute over the amount the Gaskins are due has not been resolved is their refusal, for reasons unexplained, to seek to resolve the matter.

The Gaskins also testified they agreed to settle the lawsuit. Their dispute with Wegman was over the amount of their recovery, not the settlement itself. Despite taking this position, the Gaskins testified in deposition that they had no expert witnesses to support their theory of causation.[1] Donald Gaskin testified that he had not consulted with another expert or retained an expert who would support his position at trial. He had no evidence to refute the fact he had no compensable damages. No one told him that any of the damage to his home was caused by the excavation. Mary Gaskin testified she felt they were entitled to the full amount of the damage estimate. She believed they would have won at trial based on the damages report. She was not aware of any evidence that would have supported their case at trial.

The Gaskins cannot create a triable issue of disputed material fact by contradicting their own deposition testimony. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 22; *Collins v. Hertz Corp.* (2006) 144 Cal.App.4th 64, 79; *Wilkins v. National Broadcasting Co., Inc.* (1999) 71 Cal.App.4th 1066, 1081-1082.) Their testimony establishes they brought this action to recover the amount of the damages estimate. It is undisputed that sufficient funds to cover the estimate have been placed in trust.

Until resolution of their entitlement to the funds held in trust is complete, the Gaskins cannot establish damages, a necessary element of their causes of action. "'[D]amages may not be based upon sheer speculation or surmise, and the mere possibility or even probability that damage will result from wrongful conduct does not render it actionable. [Citation.]' (*In re Easterbrook* (1988) 200 Cal.App.3d 1541, 1544.)" (*Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 661-662.) "'[I]f the propriety of an attorney's advice is contingent on the outcome of a claim by or against the client, the client does not sustain actual injury until the claim is resolved adversely, which

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[1] The Gaskins' deposition testimony made clear they had no expert at the time of the underlying case or at the time of their deposition. They did have an expert by the time of the ruling on the motion for summary judgment.

indicates both that the attorney erred and that the error caused harm.' (*Van Dyke v. Dunker & Aced* (1996) 46 Cal.App.4th 446, 453; see also *Baltins v. James* (1995) 36 Cal.App.4th 1193, 1203.) Actual injury occurs only 'when the client finally suffers a detriment, which is not merely potential or tentative, as a direct result of the malpractice . . . .' (*Tchorbadjian v. Western Home Ins. Co.* (1995) 39 Cal.App.4th 1211, 1223.)" (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1511.)

The Gaskins have not established they suffered damages and certainly not damages in excess of $180,000. The outcome of their claim remains in dispute. Under settled rules applicable to attorney malpractice actions, summary judgment was properly granted on the ground actual injury has not been established.

The difficulty with the approach of the Gaskins is that in an attorney malpractice action where the claim is based upon improper conduct in the settlement process, the issue is not "the amount that a client *might* have received in connection with a claim" but is instead "the actual value of the claim." (*Loube, supra,* 64 Cal.App.4th at pp. 426-427.) "It is well settled that '. . . an attorney is liable for malpractice when his negligent investigation, advice, or conduct of the client's affairs results in loss of the client's *meritorious claim.* [Citation.]' (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 900, italics added.)" (*Loube, supra,* at pp. 426-427.) The focus is not on what would have happened in the litigation, but on what should have happened. (*Ibid.*)

The Gaskins argue that Mayes's declaration establishes a triable issue of material fact on the question of causation of damages resulting from earth movement caused by the excavation. However, merely presenting a different opinion on causation is not sufficient to defeat summary judgment. Mayes's declaration does not establish that the Gaskins sustained an actual injury, because their claim has not been resolved. The mere possibility that the Gaskins have a claim to $180,000 or more does not constitute an actual injury, nor does it establish the actual value of their claim. The Gaskins' claim is merely potential or speculative and under the above authorities, insufficient to survive summary judgment.

For these reasons, we need not discuss whether the trial court properly struck Mayes's declaration, or that of any of the other witnesses offered by the Gaskins as experts in opposition to summary judgment. None of the declarations tendered by the Gaskins established the existence of actual damages, and as stated, a mere possibility of damages is insufficient to support a claim of attorney malpractice or breach of fiduciary duty.

Tort of Another

The Gaskins argue that at a minimum they have been caused damages by Wegman's legal malpractice and breach of fiduciary duty because of the expense they will incur in resolving their claim to the funds held in trust. Relying on the tort of another doctrine (*Prentice v. North American Title Guaranty Corp.* (1963) 59 Cal.2d 618, 620), the Gaskins argue that they have been damaged to the extent they must pay attorney fees and the costs of a neutral arbitrator in order to recovery their share of the settlement.

Wegman argues this contention was not made in opposition to summary judgment and is therefore forfeited. The Gaskins concede the issue was not raised below, but argue it presents a pure question of law based on undisputed facts, which this court has discretion to consider.

We deem the issue forfeited and respectfully decline the request to consider the issue for the first time on appeal. (*Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1081; *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 31.) This case was competently and thoroughly litigated on both sides in the trial court. It should not be decided on appeal on a ground not asserted below. It would be unfair to Wegman and the trial court to reverse a judgment on an issue not raised in opposition to summary judgment. We do not agree that the facts pertaining to this issue are undisputed, as the record contains no facts relating to the costs the Gaskins might incur to resolve this issue through a neutral arbitrator. We cannot

exclude the possibility the neutral may propose a resolution that includes costs and attorney fees to the Gaskins.

Placement of the Funds in Trust

The Gaskins argue that placement of the funds in trust does not establish that Wegman was entitled to summary judgment on a theory that they cannot show damages. In the absence of Wegman's negligence and breach of her fiduciary duty in the settlement process, the funds would not have had to be placed in trust. Had they known the full details of the settlement proposal, they could have made an informed decision whether to settle, and if some plaintiffs received a full amount of damages, the Gaskins would not have agreed to a reduced amount. The Gaskins should not be penalized for failing to arbitrate their claim in lieu of a malpractice action. Finally, the Gaskins question whether the funds have actually been placed in trust because the information provided does not show an account number, when the account was opened, or who opened it.

Most of these arguments have been discussed and rejected earlier in this opinion. The Gaskins sought damages based on the estimate by Affiliated Professional Services, and that amount has been set aside in trust. Assuming they were not fully informed regarding the settlement—an issue we need not reach—the Gaskins have not established that they suffered an injury or that they will not be fully compensated once their claim is resolved. They are not being penalized for filing a malpractice action rather than pursuing arbitration; under settled case law, Wegman was entitled to summary judgment because damages have not been established.

Finally, we reject the argument that insufficient proof was provided that the funds were placed in trust. Wegman presented a one-page statement from the trust account of her law firm, covering the period from August 1 through 31, 2009 (exh. No. 55). The statement showed a balance of $194,836.31. Wegman stated in her declaration the exhibit was a true and correct print out of the firm's trust account, which included payments from other plaintiffs for their share of continued forensic monitoring of the

slope repair. No additional proof was required to demonstrate that the funds were held in trust pending resolution of the Gaskins' claim.

Evidentiary Rulings

The trial court sustained numerous objections to the Gaskins' declarations and granted Wegman's motion to strike the declaration of the Gaskins' expert witnesses—Stuart Mayes, David Adame, Steven Glickman, Juan Alvarez, Kurt Bohmer, and Margarito Castillo. The Gaskins argue on appeal that the trial court erred in sustaining "shotgun" objections made on grounds of relevance, foundation, speculation, and hearsay.

Donald Gaskin's Declaration

The Gaskins argue the trial court erred in sustaining an objection to paragraph 44 of Donald Gaskin's declaration that they incurred in excess of $500,000 in damages. Paragraph 44 states that Donald acted as contractor "in repairing the damages caused by earth movement resulting from the excavation performed" by the builder. Paragraph 44 indicates that the Gaskins spent over $500,000 to repair their home, based on the cost of asbestos removal, kenneling of dogs, moving expenses, and building and attorney fees.

The trial court properly sustained Wegman's objections to paragraph 44 on the grounds of lack of foundation, speculation and hearsay as to why construction work was performed including the cause of damage. The paragraph was an explanation of what the Gaskins spent "in repairing the damages caused by earth movement resulting from the excavation performed" by the builder. Donald's declaration lacks foundation for his statement as to causation of the damage. The trial court could reasonably conclude that Donald was speculating as to the cause of the damage, or that he was relying on hearsay in reaching his conclusion.

No argument is made regarding the balance of the evidentiary rulings on Donald's declaration, in which the trial court sustained objections to paragraphs 1, 3, 5, 9-12, 15, 41-45, and 47-54. No discussion is required as to the balance of rulings in the absence of argument on appeal.

The Glickman Declaration

Glickman prepared a declaration expressing his opinion on Wegman's compliance with the standard of care for attorneys in the community. The trial court struck the declaration on Wegman's motion ruling the declaration was irrelevant to the issues on summary judgment, and was pertinent only to the issue of breach of duty, which was not in dispute.

The trial court's ruling was correct under either the abuse of discretion standard or upon de novo review. The issues raised in the summary judgment motion were causation and damages, not whether Wegman's conduct satisfied the standard of care for attorneys in the community. As set forth in detail above, the Gaskins did not present evidence sufficient to defeat summary judgment on those issues. Glickman's declaration was not relevant to the issues on summary judgment. The order striking the declaration was neither error nor prejudicial. (Cal. Const., art. VI, § 13.)

The Protective Order

The Gaskins gave notice of a deposition of the custodian of records of Washington Mutual Bank, pursuant to a subpoena, to produce the following documents: all signature cards for the account entitled "Wegman, Levin & Stanley Fessler Client Trust Account" from 2007 to the present; all bank statements on the account for the same time period; and all loan applications submitted by Wegman or by the law firm for the purpose of financing cases of the law firm or for working capital from 2003 to 2007.

Wegman and her law firm moved for a protective order. They asserted the subpoena violated their privacy rights and those of third parties, citing *Hinshaw Winkler v. Superior Court* (1996) 51 Cal.App.4th 233 (*Hinshaw*). The documents requested were not relevant to the Gaskins' claim of malpractice. The only issue in the case is whether the Gaskins can show they are entitled to any portion of the $180,000 set aside in trust. Disclosure of the amounts disbursed to individual plaintiffs would violate their privacy rights. The trial court granted the motion for a protective order.

The Gaskins argued in the trial court, and now contend on appeal, that *Hinshaw* is factually distinguishable and does not constitute an absolute bar to this type of discovery. They contend that all of the plaintiffs in the underlying action were entitled to know how much each plaintiff recovered. The information on other settlements is relevant as the Gaskins were entitled to know what others received before agreeing to settle their claim for less than full value. The bank records could show that the case was settled to avoid the ongoing costs of litigation to the law firm. The records could confirm that $180,000 was set aside to satisfy the Gaskins' potential claim. Finally, the records were relevant to the law firm's entitlement to attorney fees, as violation of a duty to a client may result in forfeiture of some or all of an attorney's compensation.

We review the trial court's action in issuing a protective order under the deferential abuse of discretion standard. (*Moskowitz v. Superior Court* (1982) 137 Cal.App.3d 313, 317.) Bank records are the subject of a constitutionally protected privacy interest. (*Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 656-658.) "Because the requested material is constitutionally protected, the ordinary yardstick for discoverability, i.e., that the information sought may lead to relevant evidence, is inapplicable. (*Kahn v. Superior Court* (1987) 188 Cal.App.3d 752, 766.) Moreover, it is not enough to show the matters encompassed by the right of privacy are merely relevant to the issues of ongoing litigation. There must be a careful balancing of the *compelling public need* for discovery against the fundamental right of privacy. (*Ibid.; Binder v. Superior Court* (1987) 196 Cal.App.3d 893, 900.)" (*Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 392.)

The decision in *Hinshaw, supra,* 51 Cal.App.4th 233 is controlling. In *Hinshaw,* a malpractice action was brought against attorneys, alleging the attorneys dropped the plaintiffs from an underlying class action against a medical provider, before the case settled. The plaintiffs sought discovery of the confidential settlement in the class action. The trial court denied the attorneys' motion for a protective order. The Court of Appeal recognized the privacy rights of the class members who settled their action and placed the burden on the party seeking discovery to "show a compelling and opposing state interest." (*Id*. at p. 239; see also *id.* at p. 241 ["a private settlement agreement is entitled to at least as much privacy protection as a bank account or tax information"].) Essential to the court's reasoning was "the public policy favoring settlements, the parties' expressed desire for confidentiality, and the speculative nature of measuring plaintiffs' damages by these settlements." (*Id*. at p. 242.) A writ of mandate issued directing the trial court to reverse its decision to deny a protective order.

The record does not establish an abuse of discretion in granting the protective order under the reasoning in *Hinshaw*. The plaintiffs and builder who settled had no expectation a third party, such as the Gaskins, could obtain the details of their confidential settlement through the law firm's banking records. The trial court could reasonably conclude the banking records demanded by the subpoena were not relevant to the Gaskins' claim, as their entitlement to damages was dependent on the amount of their loss, if any, due to the earth movement. The law firm, and its members, had a right to privacy in the banking records, and the Gaskins' have not demonstrated the type of compelling interest that would outweigh the right to privacy.

DISPOSITION

The judgment is affirmed. Debra Wegman is awarded costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.